A **Majlis Perbadanan Kangar v Sonati Development Corp Sdn Bhd**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO R–02–640 OF 2006
B GOPAL SRI RAM, ZULKEFLI AND RAUS SHARIF JJCA
21 SEPTEMBER 2006

Civil Procedure — Appeal — Notice of — When appeal is 'brought' — Whether notice
C *of appeal must be filed and served before appeal is considered properly brought before the court — Whether notice of appeal could be validated*

The respondent had brought an action for breach of contract against the appellant.
D The trial judge found for the respondent. His decision was handed down on 4 February 2005. The appellant then filed its notice of appeal on 17 February 2005. But it never served on the respondent. Later, on 26 April 2005 it sent a notice of withdrawal of the same date to the respondent's solicitors for their signature. The respondent's solicitors signed it and returned it to the appellant's solicitors.
E The notice of withdrawal was filed and the appeal discontinued. The assessment of damages proceeded before the registrar of the High court at Kangar. After the assessment was completed the appellant did not appeal against the decision of the registrar to the judge in chambers. Instead it appealed directly to this court by way of its notice of appeal dated 15 June 2006. On 14 June 2006, the respondent filed its application to strike out the appeal. On 25 July 2006, the appellant sought to
F obtain an order to validate the notice of appeal it had filed on 15 June 2006 or alternatively for an extension of time to file a notice of appeal. The respondent sought to strike out the appeal. The main thrust of the appellant's case was that it had withdrawn its earlier appeal acting on the advice of its former solicitor. However, no evidence from the former solicitor was filed to confirm that this was indeed the case.

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Held, dismissing the appellant's application:

(1) This court is bound by the decisions in *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370, *Tan Ting Kok v Cheong Lep Keen & Anor* [1969] 1
H MLJ 153 and *Tong Lee Hwa & Anor v Malayan Banking Bhd* [1978] 1 MLJ 257, so that the result still remains that an appeal is not 'brought' until the notice of appeal is both filed and served. Accordingly, the earlier appeal lodged by the appellant had not been properly brought and was utterly incompetent. It may be therefore inferred from the facts that that appeal was withdrawn
I because it was incompetent and not for any other reason (see para 12).

(2) There was a stronger reason for rejecting the appellant's application. The appellant had sought to appeal to this court directly from the registrar's decision without first appealing to the judge in chambers in accordance with O 56 of the Rules of the High Court 1980. It followed that the notice of

appeal filed by the appellant on 15 June 2006 was invalid and that there was no competent appeal before the court. Accordingly, no question of extending time arises (see para 13).

[Bahasa Malaysia summary

Responden telah memulakan satu tindakan pengingkaran kontrak terhadap perayu. Hakim bicara telah memutuskan memihak kepada responden. Keputusannya telah diberikan pada 4 Februari 2005. Perayu kemudiannya telah memfailkan satu notis rayuan pada 17 Februari 2005. Tetapi ianya tidak diserahkan ke atas responden. Kemudian, pada 26 April 2005 ia telah menghantar satu notis penarikan yang juga bertarikh 26 April 2005 kepada peguamcara responden untuk tandatangan mereka. Peguamcara responden telah menandatangani notis tersebut dan memulangkannya kepada peguamcara perayu. Notis penarikan tersebut difailkan dan rayuan diberhentikan. Taksiran ganti rugi kemudiannya didengar di hadapan pendaftar mahkamah tinggi Kangar. Selepas taksiran selesai perayu tidak merayu terhadap keputusan pendaftar kepada hakim dalam kamar. Sebaliknya ia merayu secara terus kepada mahkamah ini melalui notis rayuannya yang bertarikh 15 Jun 2006. Pada 14 Jun 2006 responden telah memfailkan permohonannya untuk membatalkan rayuan tersebut. Pada 25 Julai 2006 perayu memohon satu perintah mengesahkan notis rayuannya yang difailkan pada 15 Jun 2006 atau secara alternatif untuk satu lanjutan masa untuk memfailkan satu notis rayuan. Responden memohon untuk membatalkan rayuan tersebut. Alasan utama kes perayu ialah beliau telah menarik rayuannya yang terdahulu atas nasihat peguamcaranya yang terdahulu. Akan tetapi tiada keterangan dari peguamcaranya yang terdahulu difailkan untuk mengesahkan perkara ini.

Diputuskan, menolak permohonan perayu:

(1) Mahkamah ini terikat dengan keputusan di dalam kes *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370, *Tan Ting Kok v Cheong Lep Keen & Anor* [1969] 1 MLJ 153 dan *Tong Lee Hwa & Anor v Malayan Banking Bhd* [1978] 1 MLJ 257, maka hasilnya masih tetap yang sesuatu rayuan tidak dibawa sehinggalah notis rayuan difailkan dan diserahkan. Dari itu, rayuan terdahulu yang difailkan oleh perayu tidak dibawa dengan teratur dan sama sekali tidak memuaskan. Oleh yang demikian ianya boleh dibuat kesimpulan dari fakta-fakta yang bahawa rayuan tersebut telah ditarik balik kerana ianya tidak memuaskan dan bukan atas alasan yang lain (lihat perenggan 12).

(2) Terdapat alasan yang lebih kukuh untuk menolak permohonan perayu. Perayu membuat rayuan terhadap keputusan pendaftar secara terus ke mahkamah ini tanpa membuat rayuan terdahulu kepada hakim di dalam kamar selaras dengan peruntukan A 56 Kaeadah-Kaedah Mahkamah Tinggi 1980. Oleh yang demikian notis rayuan yang difailkan oleh perayu pada 15 Jun 2006 adalah tidak sah dan dari itu tidak terdapat satu rayuan yang teratur di hadapan mahkamah ini. Jadi, tidak terdapat persoalan mengenai perlanjutan masa (lihat perenggan 13).]

Notes

For cases on notice of appeals, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 1207–1213.

Cases referred to

Christopher v Croll (1885) 16 QBD 66 (refd)
Gurbachan Singh v Seagrott & Campbell (No 2) [1962] MLJ 370 (refd)
Syed Aziz bin Ibrahim v Hayward [1973] 2 MLJ 175 (refd)
Tan Ting Kok v Cheong Lep Keen & Anor [1969] 1 MLJ 153 (refd)
Whitehouse Hotels Pty Ltd v Lido Savoy Pty Ltd (1974) 131 CLR 333 (refd)

Legislation referred to

High Court Rules [Aust] O 70 rr 4(1), 5(1), (2), (3), (4), (5)
Rules of the Court of Appeal 1994 rr 5(1), 6, 12, 102
Rules of the High Court 1980 O 56
Rules of the Supreme Court 1957 O 58 rr 1A(1), 2, 15

N Shanmugavadivelan (Vazeer Akbar Majid & Co) for the appellant.
Murali Achan (K Kulasekar with him) (K Kulasekar, Achan & Associates) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] Two motions came before us. One of them (encl 11A) was by the appellant. I will refer to it as the appellant's application. In this application the appellant sought to obtain an order to validate the notice of appeal it had filed on 15 June 2006 or alternatively for an extension of time to file a notice of appeal. The other motion was by the respondent (encl 7A). I will refer to it as the respondent's application. It sought to strike out the appeal. The facts relevant to these applications are as follows.

[2] The parties to this litigation entered into a contract. The appellant terminated that contract. The respondent brought an action for breach of contract. There was a trial. The judge who tried the case found for the respondent. He ordered damages to be assessed. His decision was handed down on 4 February 2005. The appellant then filed its notice of appeal on 17 February 2005. But it never served it on the respondent. Later, on 26 April 2005 it sent a notice of withdrawal of the same date to the respondent's solicitors for their signature. The respondent's solicitors signed it and returned it to the appellant's solicitors. The notice of withdrawal was filed and the appeal discontinued. The assessment of damages proceeded before the registrar of the High court at Kangar. After the assessment was completed, the appellant did not appeal against the decision of the registrar to the judge in chambers. Instead, it appealed directly to this court by way of its notice of appeal dated 15 June 2006. On 14 June 2006, the respondent filed its application to strike out the appeal. It was not until 25 July 2006 that the appellant filed its application.

[3] The main thrust of the appellant's case was that it had withdrawn its earlier appeal acting on the advice of its former solicitor. However, no evidence from the former solicitor was filed to confirm that this was indeed the case. In the absence of

such evidence, the respondent is really at sea because it is unable to meet the mere allegation by the appellant that such advice was given. Further, as pointed out by learned counsel for the respondent, this allegation is not credible as the real reason for the withdrawal appears to be that the notice of appeal in the earlier appeal was never served on the respondent's solicitors. So there was no appeal properly brought by the appellant in the first place.

[4] According to the authorities as they stand today, an appeal is only properly brought within the meaning of the rules of court when the notice of appeal is both filed and served on the respondent. Service on the respondent must be effected within the period limited for filing the appeal, that is to say, within 30 days of the decision of the High court.

[5] The starting point is *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370. In that case, Suffian J gave his judgment on 3 April 1962. The appellant filed his notice of appeal on 1 or 2 May 1962. He served the notice of appeal on the respondent on 9 May 1962. The relevant rule of court was O 58 of the Rules of the Supreme Court 1957 ('RSC 1957'). Let me set out the relevant provisions of that rule of court.

First, r 1A(1) which reads:

> Appeals to the Court of Appeal shall be by way of re-hearing and shall be brought by giving notice of appeal.

Next, r 2:

> Notice of appeal shall be served on all parties directly affected by the appeal … at the time of filing the notice of appeal.

Then, r 15:

> No appeal shall, except by special leave of the full Court of Appeal, be brought after the expiration of one month —

[6] Let me pause to say that r 1A(1) of the RSC 1957 is in pari materia with the present r 5(1) of the Rules of the Court of Appeal 1994 ('1994 Rules'); that r 2 of the former is similar to r 6 of the latter save that r 6 uses the expression 'within the time limited for the filing of the notice of appeal' and not 'at the time of filing the notice of appeal'; and lastly that r 15 of the former is similar to r 12 of the latter save that r 12 uses the words 'leave of the court' and not 'special leave of the full Court of Appeal'.

[7] In *Gurbachan Singh*, the RSC 1957 were interpreted to mean, first, that the notice of appeal must be served on a respondent on the very day on which it was filed; and second, that an appeal was not 'brought' unless such service was effected. In coming to that decision, the Court of Appeal of the Federation of Malaya whose judgment was delivered by Thomson CJ relied on and applied *Christopher v Croll* (1885) 16 QBD 66 which had interpreted rules in the English RSC governing appeals to the English Court of Appeal. But, if you look at the English rules of court,

you will find that appeals to the English Court of Appeal are brought — not by way of a notice of appeal — but by way of a notice of motion. A notice of motion carrying on its face a returnable date must, of course, be served on a respondent in order for the appeal to be effective. That is not — and has never been — the case in this country where appeals are brought by filing the notice of appeal and not by serving it. So the reliance on English authorities without realising the critical differences between them and our rules resulted in an error. Nevertheless, *Gurubachan Singh* held the field for many years although its rigour was mitigated a little as to the time within which the notice of appeal was to be served. This was in *Syed Aziz bin Ibrahim v Hayward* [1973] 2 MLJ 175 where it was held that it was sufficient if the notice of appeal is served within the time limited for filing the notice of appeal. It is the view expressed in Hayward's case that was encapsulated in r 6 of the 1994 Rules.

[8] An invitation to depart from the finding in *Gurbachan Singh* that an appeal was only brought when the notice of appeal was served was declined by the former Federal court in *Tong Lee Hwa & Anor v Malayan Banking Bhd* [1978] 1 MLJ 257. Chang Min Tat FJ said:

> It is accepted by Mr RR Chelliah for the applicants that the default of a solicitor (*Re a Debtor* [1910] WN 224) or a mistake of a solicitor's clerk (*Hendry v De Cruz* [1949] MLJ Supp 25) would not be a ground for granting the special leave of the full Court of Appeal. If this is a case for special leave, he must fail. He argues however that he does not have to apply for this special leave. All he needs to do is to apply for ordinary leave and that is because having filed the notice of appeal in the court Registry within time, he has sufficiently 'brought' the appeal before the Federal court for all the purposes of rule 6. His reasoning is that bringing an appeal up and serving the notice of appeal are two different matters.
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> Authority however is against him. The Court of Appeal in *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370, which dealt with O 58 rr 15, 1A(1) and 2, Rules of the Supreme Court which are in pari materia with rr 13, 6(1) and 7, held that an appeal could only be said to be brought when the notice of appeal was served on the respondent. The case relied on by the Court of Appeal was the English case of *Christopher v Croll* (1885) 16 QBD 66. It is however urged by Mr Chelliah that reliance on the English case was unsafe and the judgment of the Court of Appeal therefore erred since in England, the notice of appeal need not be served. But it seems to us by this argument that where there is a statutory requirement for service of the notice on the respondent, failure to serve must be a stronger argument for the conclusion that the appellants had not brought up the appeal within the requirements of the rules. With respect, we see no reason for departing from *Gurbachan Singh*'s case, or from *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 (FC) which followed *Gurbachan Singh*'s case.
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> There is further support for the rejection of Mr Chelliah's contention in *Tan Ting Kok v Cheong Lep Keen & Anor* [1969] 1 MLJ 153, a decision of this court, which held that rr 6 and 7 of the Federal Court (Civil Appeals) (Transitional) Rules 1963 must be read together and when notice of appeal is filed with the court, a copy must at the same time be served on the respondents or their solicitors. On this interpretation, the Federal Court was of the opinion that where notice had not been served on the other side within time, the appeal had not been brought before it.

[9] In this context it may be useful to refer to O 70 of the High Court Rules of Australia. Rule 4(1) of those Rules provide as follows:

> Every appeal shall be instituted by the filing of a notice of appeal in the manner prescribed in rr 5 and 6 of this Order.

Subrules (1) and (2) of r 5 prescribe the manner of the filing of a notice of appeal, while sub-rr (3), (4) and (5) deal with the service of the notice of appeal. The service provisions require the notice of appeal to be served on the same day on which it is filed. Then, O 70 r 4(1) in its material part provides as follows:

> (1) The notice of appeal shall be filed and served in the manner prescribed by the last preceding rule —
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> (a) within twenty-one days after —
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> (i) the date when the judgment appealed from was pronounced;
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> (b) within such further time as is allowed by a Justice upon application made to him by summons issued within the period of twenty-one days referred to in the last preceding paragraph.

[10] In *Whitehouse Hotels Pty Ltd v Lido Savoy Pty Ltd* (1974) 131 CLR 333, the effect of the foregoing Rules came up for decision. The facts there were these. On 21 August 1974, the Full Court of the Supreme Court of Victoria dismissed the appellant's appeal. The appellant wished to appeal to the High Court. On 11 September 1974, the appellant lodged a notice of appeal with the High Court's registry. However, its affidavit setting out the facts which showed that it was entitled to appeal without leave was defective. It was taken away, re-sworn and filed on 12 September 1974. On the same day, the appellant served the notice of appeal on the respondent who objected to the competency of the on the ground that the notice of appeal had not been served on it on 11 September as required by the Rules. The objection failed. The court (Menzies, Gibbs & Stephen) said:

> Upon the proper construction of the rules, once a notice of appeal is filed within time and in the proper manner, an appeal is instituted. If the notice of appeal has not also been served within the prescribed time there will have been a failure to comply with the rules. In such a case the appellant might apply under O 64, r 2 to be relieved from the consequences of non-compliance with the rules, or the respondent might apply in accordance with O 64 r 3 to set the proceedings aside for irregularity. However, subject to the power of the court to set aside, amend or otherwise deal with the proceedings, the non-compliance will not render the appeal void unless the court or a Justice so directs: O 64, r 1 [The equipollent of Rule 102 of the Rules of the Court of Appeal 1994]
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> It may be that the reason for the distinction drawn between the filing and the service of a notice of appeal is that it will normally always be possible to file a notice within time but not always possible to serve it. Whether or not this is so, the words of the rules in their present form indicate that it is the filing, and not the service, of the notice that commences an appeal.

[11] If we apply the foregoing reasoning to our Rules, the effect is that an appeal is to be treated as having been brought by filing a notice of appeal. An appellant is required to serve the notice of appeal within the time limited for filing but if he fails

to do so, the appeal is not void or incompetent but merely irregular by reason of r 102 of the 1994 Rules and this court may deal with the irregularity in such manner and upon such terms as this it court 'shall think fit'. The usual way in which this court deals with such a matter is to extend the time limited for service of the notice of appeal, provided, of course an application is made in that behalf and affidavit evidence is led giving the reasons for failure to serve within the time limited by the Rules.

[12] Unfortunately, *Whitehouse Hotels Pty Ltd v Lido Savoy Pty Ltd* was not brought to the attention of the court in *Tong Lee Hwa*. If it had been, the result may well have been different. Be that as it may, this court is bound by the decisions in *Gurubachan Singh*, *Tan Ting Kok v Cheong Lep Keen & Anor* [1969] 1 MLJ 153 and *Tong Lee Hwa*, so that the result still remains that an appeal is not 'brought' until the notice of appeal is both filed and served. Accordingly, the earlier appeal lodged by the instant appellant had not been properly brought and was utterly incompetent. It may be therefore inferred from the facts that that appeal was withdrawn because it was incompetent and not for any other reason.

[13] There is a stronger reason for rejecting the appellant's application. It is this. The appellant has sought to appeal to us directly from the registrar's decision without first appealing to the judge in chambers in accordance with O 56 of the Rules of the High Court 1980. It follows that the notice of appeal filed by the appellant on 15 June 2006 is invalid and that there is no competent appeal before us. Accordingly, no question of extending time arises.

[14] For the reasons already given, the appellant's application was dismissed and an order in terms of the respondent's application was made. The appellant was ordered to pay the costs of both applications.

[15] My learned brothers, Zulkefli and Raus Sharif JJCA have seen this judgment in draft and have expressed their agreement with it.

Appellant's application dismissed.

Reported by Loo Lai Mee